Before the
Federal Communications Commission
Washington, D.C. 20554

In The Matter Of	)	
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Review of Regulatory Requirements for Incumbent LEC Broadband Telecommunications Services	)	CC Docket No. 01-337
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REPLY COMMENTS OF IP COMMUNICATIONS CORPORATION ON THE NOTICE OF PROPOSED RULEMAKING RELATING TO THE REGULATORY TREATMENT OF ADVANCED SERVICES PROVIDED BY DOMINANT WIRELINE CARRIERS

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On December 20, 2001, the Federal Communications Commission's ("FCC" or the "Commission") released its Notice of Proposed Rulemaking relating to treatment of dominant wireline providers when providing advanced services ("*Non-dominant NPRM*" or "*NPRM*"). IP Communications ("IP") is a Competitive Local Exchange Carrier ("CLEC") whose offerings provide broadband solutions to its customers. Pursuant to that notice, IP filed initial comments on March 1, 2002. IP will be immediately affected by the ruling on the *NPRM*.

INTRODUCTION AND SUMMARY

IP files these comments in reply to responses filed by other parties to the *NPRM* regarding regulatory treatment of incumbent local exchange carrier ("ILEC") broadband telecommunications services. These reply comments demonstrate that the positions taken by IP, as well as other commenters such as Comptel, AT&T and Earthlink, are strongly supported by facts and reality while rhetoric of incumbent local exchange carriers ("ILEC"), such as SBC[1], does not withstand scrutiny.

As stated in initial comments, IP agrees that broadband deployment, fostering broadband competition, promoting innovation, and eliminating unnecessary regulation are valid goals.[2] What has become even more obvious in the record of this proceeding is that the history of the advanced service market has shown that the fostering of competition by a large number of providers has been the best means to promote innovation.[3] In these reply comments, IP highlights the factual support for this position contained in the comments of others. Additionally, IP points to numerous statements in SBC's comments that actually are supportive of the competitive local exchange carrier ("CLEC") positions and against the policy recommendations of ILECs in this proceeding as well as other proceedings.

DISCUSSION

I. The Record from the First Round of Comments Does Not Support the Reclassification of ILEC DSL services as Non-dominant.

As has been common during the broadband debates at legislatures and at commissions, the constant battle for CLECs has been to simply have decision makers take the time to look past the ILEC rhetoric and to the facts. Regarding dominance in DSL services, the same is true. With closer scrutiny, there is truly no doubt that ILECs continue to have market power in the area of DSL services and, while not necessary to the ultimate decision in this proceeding, have used that power to the detriment of consumers and the development of competition.

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1 Because IP is a regional carrier in the SBC territory, most examples from ILEC conduct and drafted positions of SBC ILECs. However, because many of the same positions and conduct has occurred across large ILECs, the examples are applicable beyond SBC's ILEC territories.

2 *Non-dominant NPRM* at 4.

3 See e.g., Comptel Comments at 24-26.

a. ILECs Continue to have Market Power.

The FCC rules make it clear that if a carrier has market power, it is a dominant carrier.[4] Moreover, the record in this proceeding shows that ILECs continue to have market power in many relevant markets within or related to broadband services/DSL. These markets include broadband services viewed as a whole, DSL services in particular, wholesale transport services as viewed by Internet Service Providers ("ISPs"), and voice services that are often tied through bundled offerings with DSL services. As such, it is imperative that the Commission consider in this proceeding and others the interrelated nature of telecommunications and the attendant impacts that decisions made here will have on the ability of the competitive promise of the FTA to survive.

1. Market Power over DSL

The continuing dominance of ILECs over the DSL platform is overwhelming. As an example, the New York Public Service Commission shared its finding that "ILECs still possess market power over the platform needed to provided telephone broadband services."[5] Similarly, the Public Service Commission of the State of Missouri ("MoPSC") noted that evidence has demonstrated that SBC continues to have over 90% of the DSL market in Missouri.[6] Beyond the specific examples, every national survey referenced in the record shows ILEC DSL market share near or exceeding 90%.

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4 47 CFR §§ 61.3(q), 61(y).
5 NYPSC comments at 1-2.
6 MoPSC comments at 3.

The high degree of DSL market concentration in the hands of ILECs turns out to only be the tip of the iceberg. Comptel's comments, for example, do an excellent job of stepping below the glossy rhetoric of the ILECs to focus on the control of bottleneck facilities and the differences in different product and geographic markets.[7] It is uncontroverted that ILECs have near exclusive ownership of the telephone wireline to both residential and business customers. ILECs will generally concede this point but fail to then acknowledge that with such control of over facilities, 90% market share in the DSL market, and approximately 90% market share over voice markets, they have the ability to utilize market power by leveraging each of these realities off one another. This reality is exemplified by ILEC data operations/affiliates that have and often continue to refuse to provide DSL to consumers that obtain local exchange service from a CLEC. It is also shown by the ILECs accrual of 90% DSL market share though exclusionary actions where they would line-share with themselves but not with data CLECs.

Finally, it is important to not stop at the broad brush that ILECs attempt to apply to all means of high-speed transmission. It simply is not the case that all means of high-speed transport are so interchangeable that they constitute one market. For example, Earthlink in its comments noted that "since cable is a shared medium and DSL is a virtual private connection, consumers may not view the characteristics of the two platforms as completely substitutable or competitive, since each service has unique issues of privacy, security, and service quality such as assured bandwidth speed and repair times."[8] IP can verify that point. The characteristics between DSL and cable modem service can be great. All one has to do is watch some of the commercials that ILECs have placed on the air concerning the delays caused by download delays that can result from shared use of cable plant to see one substantial difference, yet those same ILECs put their blinders on when talking to the FCC. Additionally, DSL can be far more secure

[7] See Comptel Comments 3-18.

a communication medium than cable modem service due to the shared nature of the cable architecture. Beyond those two large differences, other differences concerning the varied flavors of DSL that an end user can access through DSL technologies help distinguish DSL from cable.

2. Market Power in Broadband Markets Generally

Even if all "broadband" services are interchangeable such that they constitute one market, which they are not, it is important to look at greater detail then merely national averages to obtain a true picture of service and geographic areas when determining whether ILECs continue to be dominant in their provision. Comptel, for example, provided very telling data regarding the lack of overlap between DSL facilities and locations where cable modem services is available. In spite of what ILECs would lead the Commission to believe, the source cited by Comptel found that DSL capability and cable modem service availability only overlap 25.4% of the time.[9] That means that 74.6% of the time, consumers will not have effective competition often facing an effective monopolist without intramodal competition.[10] And for the lucky 25.4%, they must endure a duopoly.[11]

Taking these startling numbers and the DSL market concentrations of two very different states, Missouri and New York into account, it is clear that there can be a very significant and worrisome result on a national scale if the ILEC agenda is allowed to bully its way to public policy. Finally, this Commission reached the identical conclusion as recently as 1999. Specifically, as part of the SBC/Ameritech merger decision, the Commission held that ILECs

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[8] Earthlink Comments at 17.

[9] Comptel Comments at 11.

[10] The record strongly supports the conclusion that satellite and fixed wireless are not currently effective competitors in these markets. See e.g. Comptel at 9-11 (discussing cost and technological barriers that prevent these technologies from being ubiquitous and competitively effective with ILEC DSL services).

[11] Although the ultimate conclusion of the ILEC position appears to be that unregulated duopolies are a good thing, basic economic analysis demonstrates that with a duopoly comes restricted output, excessive prices, and diminished public welfare. Also, see e.g. Comptel at 5-8 (noting the ability of ILECs to maintain a 25% price

have the incentive and ability "to discriminate against competitors in the provision of advanced services."[12]

b. ILECs have Abused Their Market Power.

Not only is the existence of market power undeniable from an analytical perspective, ILECs have repeatedly used that market power to the detriment of consumers and the development of competition. SBC, for example, boasts as if it is proving its case that cable providers are its predominant competition. However, it neglects to state that the reality that ILECs see their largest competitor as cable has resulted from anticompetitive, discriminatory, and bad faith failures to properly and fully comply with the dictates of the FTA. This Commission has repeatedly found that ILECs have engaged in anticompetitive conduct in the area of DSL implementation. For example, in the *Line Sharing Order*, the Commission concluded that ILECs engaged in anti-competitive practices by prohibiting CLEC DSL providers to line-share at parity with the ILEC allowance of its own DSL service to line share with their own voice services.[13]

In addition to these and other documented findings of anticompetitive activity of ILECs, SBC appears to have accused itself and other ILECs of predatory pricing. At page 41 of its comments SBC favorably cites a study stating that "the average cost per customer of a large incumbent LEC undertaking a massive DSL deployment is currently $86 …". Meanwhile, on page 18, SBC states that average broadband service marketed to mass-market customers is around $50.[14] Although IP is not accusing SBC of predatory pricing in these comments, assuming SBC believes its comments are truthful and correctly cite to accurate and

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increase only to have cable modem service providers follow the price leader with its own price increases rather than price compete).

[12] *Application of Ameritech Corp., Transferor and SBC Communications Inc. Transferee,* Memorandum and Order, 14 FCC Rcd. 14712, ¶¶ 186, 196-197 (1999).

[13] *Deployment of Wireline Services Offering Advanced Telecommunications Capability*, Fourth Report and Order in CC Docket No. 96-98, Third Report and Order in CC Docket No. 98-147, CC Docket No. 98-147, FCC 99-355 (rel. Dec. 9, 1999) ("*Line Sharing Order*").

[14] This is consistent with the $49.95 residential DSL price package on the Southwestern Bell Telephone Company website.

representative sources, it is difficult to understand how SBC is not implicitly admitting to predatory pricing.

In addition to these two examples, there are other examples. This Commission is most directly aware of how vehemently SBC fought for and won the concession to allow it to "joint market" DSL services with its voice services. That loophole has been taken to great extremes. A couple of examples are as follows:

- On the SWBT website, there are repeated references to obtaining DSL service, yet there is no mention of its affiliate ASI being the telecommunications provider, not SWBT.

- The undersigned contacted SWBT retail since the filing of initial comments in this proceeding to complain about an overcharge on his residential voice service. In the course of resolving the incorrect charge, numerous solicitations for DSL service had to be rejected. This same experience occurred months earlier when a call was made to cancel call waiting service.

These examples show clear leveraging of ILEC voice dominance to exacerbate their data dominance that was similarly built on such leveraging and well-documented anticompetitive behavior.

II. Comments of SBC are Actually Supportive of CLEC Positions in Many Ways.

In addition to SBC's near boasts with regard to leveling its DSL competitors such that cable is its primary competition, there are a number of other areas where in an attempt to build its case, SBC actually provides information that leads to conclusions diametrically opposed to the ILEC positions.

a. Legacy versus Packet Switching

SBC, like other ILECs, assume the conclusion that the various recent proceedings initiated by the Commission are an important opportunity to "chart a new course and overhaul the outdated regulatory framework that is hindering broadband deployment."[15] Beyond the fact that the record demonstrates that substantial investment and expanding broadband deployment is real world reality,[16] and that lack of demand is a more significant issue than deployment,[17] SBC's suggestion that the regulatory framework was not intended to be applicable to advanced services is entirely false. The FTA, which is 6 years old rather than 60 years old as one would assume from ILECs' rhetoric, post-dated packet switching. For example, SBC admits as it must that packet switching services were introduced in the early 1990s.[18] Yet, SBC fails to admit the obvious conclusion that since packet switching existed in the early 1990s and the FTA was enacted in 1996, Congress could have exempted packet switching/advanced services from the ILECs tariffing obligations, unbundling obligations, resale obligations, etc., but chose not to. As a result, tariffing/unbundling/resale, etc obligations are far from "outdated" regulations but instead must be considered to have been contemplated by Congress to necessarily be subject to each of those obligations. It is in spite of the fact that the ILECs cannot conceivably expect the FCC to effectively rewrite the FTA when the Congress chose not to exempt packet switching from the many FTA requirements, the ILECs have continued their full court press on legislators and regulators to create continued market uncertainty and indecision such that CLECs are harmed by the constant attacks on the FTA with ILECs benefiting from the weakness of the competition and the delays caused by such indecision. These benefits to the ILEC obviously are deemed by them to outweigh the substantial costs that are diverted from broadband deployment to grotesquely excessive lobbying costs and campaign contributions.[19]

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[15] SBC Comments at 3.

[16] See e.g. Comptel at 20; AT&T Comments at 67-72.

[17] *In the Matter of Inquiry Concerning the Deployment of Advanced Telecommunications Capability to All Americans,* , CC Dkt. No. 98-146, FCC 02-33, at ¶¶ 30, 119 (rel. Feb. 6, 2002) ("*Third Report*").

[18] SBC comments at 6 and 16.

[19] Again at page 8 and throughout its comments, in utter bad faith SBC suggests that unbundling requirements were designed for "legacy narrowband telephone network" not "broadband networks". SBC, however, nowhere

b. Customers use Broadband Services for Very Different Purposes

Particularly where ILECs discuss different customer classes, there is a clear and accurate admission that high-speed transport services are used for a variety of uses. In addition to Internet access, commenters have noted that high-speed transport services are utilized for wide area networking and voice services. But, that is not all. High-speed services are utilized for a multitude of growing purposes including, but not limited to, the following:

- Remote access video surveillance,
- Video on demand,
- Credit card authorizations,
- Video medicine,
- Remote access employee scheduling,
- Telecommuting,
- Remote education (interactive and broadcast)

The creativity and innovation that has been bred is in large part due to the fact that the high-speed telecommunications service has been not been able to monopolize content. This fact was strongly and correctly expressed in the comments of Earthlink. Specifically,

> Just as ISPs introduced consumers to the possibilities of the Internet, including e-mail, instant messaging, personalized information access, customer-driven content and other features, it is ISPs that are bringing broadband to consumers and ISPs that will help drive deployment, penetration and competition. In short, ISPs are vital to attaining the FCC's articulated goals. As the Commission has found, ISP DSL-based services will enable "affordable, high-speed access to the Internet to residential and business consumers. As a result, consumers will ultimately benefit through lower prices and greater and more expeditious access to innovative, divers broadband applications by multiple providers of advanced services."[20]

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attempts to reconcile the obvious contradictions between its positions and the fact that packet switching predated the FTA.

[20] Earthlink Comments at 20 *quoting In the Matter of Deployment of Wireline Services Offering Advanced Telecommunications Capability,* Second Report and Order, 14 FCC Rcd. 19237, ¶ 3 (1999) ("*Advanced Services Second R&O*").

Finally, IP would ask how a T1, largely based on 1960s technology, could be deemed an "advanced service" that Congress could not have reasonably considered in 1996. As absurd as it sounds, that conclusion follows from the ILEC position. The ultimate conclusion for the Commission is undeniable: ILECs were dominant providers of "advanced services" prior to the FTA, they continue to be dominant providers of "advanced services" today, and Congress could have but did not exempt facilities used for "advanced services" from the ILECs 251(c) obligations.

c. Similarity of Pricing

SBC suggests at page 20 of its comments that the fact that cable modem service and DSL are "similarly priced" is evidence that they are part of a single product market. Instead, the similarity of pricing is support for the existence of classic price leadership behavior that one would expect from a classic duopoly and/or a cartel. Cable modem service, for example, is priced similarly to DSL because cable modem providers found it more profitable to raise their prices in concert with ILECs raising their prices for DSL rather price compete. That is the future that consumers and regulators face if the ILEC broadband deregulation agenda is successful.

d. Monopolization of the Value-Added Services Market

Whether intentional or unintentional, SBC tipped the hand of the ILEC business strategy. At page 28 SBC states that, "[o]nce an incumbent LEC has deployed next generation packetized transport equipment that is capable of recognizing packetized data, the next logical step is to take advantage of this recognition by offering customers broadband services that act on information contained within packets, cells or frames." This admission is startling because it demonstrates the ILEC attempt to leverage their control of last mile facilities to foster a dominant position for ISP and other content related businesses, such as video on demand, in the same way they leveraged their voice dominance and recalcitrance to meeting their unbundling obligations to dominate the DSL market.

Consider in this context the comments of Earthlink. As Earthlink explained,

> The consumers' ability to choose ISPs and Internet applications depends vitally on the consumers' ability to connect and communicate with a range of ISPs via the broadband transport service. Intramodal competition – competing ISPs and Internet services offering consumers a range of services via a DSL connection – has been the catalyst driving the Internet thus far and it is the key to the next set of broadband "killer applications." Without an open telecommunications platform between consumers and Internet entrepreneurs there is diminished incentive to innovate and no mechanism for ISPs to use their creativity to stimulate consumer demand … The regulations under consideration here, however, will determine whether the Incumbent LECs *can stop* thousands of other ISPs from also investing in an delivering potentially a thousand other broadband applications that consumers may demand.[21]

First, Earthlink in this statement and throughout its comments adeptly discusses the additional perspective from the independent ISP that sometimes is overlooked in regulatory proceedings. Second, the mere fact that Earthlink has such profound fears for the viability of independent ISPs should the ILEC strategy succeed, is strong evidence of the dominance that ILECs continue to maintain in the area of broadband services. The comments of Earthlink appear to suggest that there may be two sets of dominant providers, ILECs and cable providers; however, even if ILECs and cable providers are both dominant, in that they have market power, that dual reality

[21] Earthlink Comments at 2.

would in no way diminish the clear determination that ILECs continue to have substantial market power in the area of advanced services just has they were dominant providers in the area of advanced services prior to February of 1996.

The Commission should be very concerned that reclassification of ILEC services as nondominant along with the remainder of the ILEC agenda will set in motion the chain of events that will likely not only decimate the data competitive industry that has followed the FTA but also cause substantial concentration of the ISP market as well as other related market segments.

e. Reliance on Private Antitrust Lawsuits

At pages 49 and 54, SBC suggests that antitrust is sufficient to curb abuse of it local bottleneck facilities. That suggestion skirts over the great cost and passage of time that are characteristics of antitrust litigation. Similarly, the SBC argument taken to its ultimate conclusion would lead to the dismantling of the Commission and all state commissions and for completely deregulated monopolists with only complex antitrust litigation to protect against abuse of market power. SBC also fails to mention that when Covad filed such a suit, that suit was swept away when SBC "invested" in Covad. The clear lessen is that with such extreme dominance and the willingness to use it, minor "investments" on the behalf of the ILECs mutes the ability of private antitrust suits to curb behavior. Like minor fines from this Commission and state commissions, antitrust settlements are a cost of doing business.

III. Benefits and Costs to ILEC tariffing of DSL services.

In IP's initial comments, IP concluded that while IP did not support a change in regulatory treatment of ILEC broadband services, if the Commission was inclined to make a change, IP proposed the implementation of narrowly-tailored waivers rather than a risky reclassification of broadband services to be nondominant. This was also the conclusion of the Public Service Commission of the State of Missouri ("MoPSC").

IP stands by the conclusion in its initial comments; however, after reviewing the initial comments, it does appear that IP undervalued the importance of continuing tariffing requirement for ILEC broadband services. Although a number of commenters addressed the value of tariffing requirements, the comments of Comptel, AT&T and Earthlink capture the breadth of their importance. For example, as AT&T noted while quoting the Commission, "tariffing of advanced services has enabled the Commission 'successfully [to] forestall [] attempts by Incumbent LECs to shift costs to monopoly services in order to justify rates that effect a price squeeze'."[22] Earthlink noted that existing dominant provider obligations have led to "non-discriminatory" "cost-based telecommunications service input, and network functionality on tariffed rates and terms."[23] Specifically, it was noted that DSL tariffing has served to alert the Commission, ISPs and CLECs of "efforts to impose egregious terms, such as "a tariff term that would allow DSL service degradation as the Incumbent LEC chooses to pursue multiple applications over the facilities used to provide DSL."[24]

IV. What the ILECs Fear is a Real Detailed Inquiry!

The ILEC strategy of go to the Legislature first, the FCC second but under no circumstances allow the state commissions to get involved, demonstrates a key point that IP has tried to get across at all levels. Where ILECs seek "high level resolution", IP has repeatedly asked for an opportunity for a detailed factual review. The closer one looks at the facts, the stronger the position that the ILEC broadband deregulation strategy is wholly invalid and unsupportable.

For example, since the filing of initial comments, the Public Service Commission of Wisconsin ordered the unbundling of SBC's Next Generation Digital Loop Carrier facilities on

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[22] AT&T at 56 *quoting GTE Tel Operating Cos.*, Memorandum and Order, 13 FCC Rcd. 22466, ¶ 32 (1998).

[23] Earthlink at 25 citing *Computer III*, FCC 2d at 1036 and 1040.

[24] Earthlink at 25-26 citing Tariff FCC No. 1, SBC Advanced Solutions Inc., effective September 10, 2001, at ¶¶ 6.1.1, 6.2.4 (noting that a subsequent tariff revision deleted contested provisions after substantial opposition form affected parties and input from FCC staff – Tariff FCC No1, SBC Advanced Solutions Inc., effective February 27, 2002.

an end-to-end basis. That makes a perfect three-for-three – Wisconsin, Illinois, and Texas – of state commissions determining that the impairment standard of the FTA has been met. With regard to this and the Commission's other broadband related inquiries, the Commission should tread cautiously before taking any actions based on a record limited by the rulemaking process when every state commission that has issued a decision following a detailed factual review has found that it was necessary to assure that these last mile, bottleneck facilities, be unbundled pursuant to Section 251(c) of the Act.

CONCLUSION

The comments provided in response to the *NPRM* have been enlightening. The FCC has brought some focus to facts that provide a record that may differ substantially from what the Commission anticipated. Information relating to the true lack of broad scale intermodal competition has opened the eyes of many and has further highlighted the need for strong and expeditious implementation of the FTA requirement that ILECs open up their bottleneck facilities so that intramodal competition can reach the vibrancy that we have all anticipated and that the ILECs have been able to forestall through a variety of tactics.

As IP explained in its initial comments, IP strongly believes that it would not be appropriate for the Commission to declare the ILECs non-dominant in the retail broadband market when there exists such a high degree of regulatory and market uncertainty. Now with the greater record before us, that conclusion is even more evident. This is particularly true when the penumbras of such a ruling are less than clear. If anything, the record strengthens the understanding of the importance of ILEC tariffing of DSL services. At most, the Commission should not issue a global finding of nondominance but seek a means of waiving applicability of

specified regulations, e.g. narrowly-tailored tariff filing obligations. But, even that result may not be wise given the value of ILEC tariffing that was demonstrated in the comments of a number of comments, including Comptel and AT&T, as well as this Commission in recent decisions If, however, the Commission finds that the tariffing requirements should not be applied, the approach of providing a waiver without a finding of nondominance provides the regulatory relief sought by ILECs while not providing a ruling that could result in unintended consequences.

Respectfully submitted,

IP COMMUNICATIONS

By_____

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April 1, 2002

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STATE OF TEXAS)
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AFFIDAVIT OF HOWARAD SIEGEL
ON BEHALF OF IP COMMUNICATIONS

Before me, the undersigned authority, on this ____ day of April, 2002, personally appeared Howard Siegel, who, upon being duly sworn, states the following:

1. My name is Howard Siegel. I am over the age of 21, of sound mind, and am competent to testify as to the matters stated herein. I am the Vice President of Regulatory Policy for IP Communications ("IP"). I have personal knowledge of the facts contained herein.

2. The facts contained in these comments and related attachments are accurate. Moreover, I have personal knowledge as to this information through the due course of my duties in my capacity as IP's Vice President of External Affairs and Regulatory Policy.

Further Affiant sayeth not.

_____/s/_____
Howard Siegel

Sworn to and subscribed to before me this ____ day of April 2002, to certify which witness my hand and seal.

_____/s/_____
Notary Public in and for the State of Texas
My Commission expires:_____